

Robert I. Sanders, OSB 70125

Email: ris@woodtatum.com

Todd A. Zilbert, OSB No. 89144

Email: taz@woodtatum.com

Wood Tatum

6915 SW Macadam Avenue, Suite 115

Portland, Oregon 97219

Tel: (503) 224-5430

Fax: (503) 241-7235

George M. Chalos (*admitted pro hac vice*)

Email: gmc@chaloslaw.com

Chalos & Co, P.C.

123 South Street

Oyster Bay, New York 11771

Telephone: (516) 714-4300

Facsimile: (516) 750-9051

Attorneys for Plaintiffs
OS Shipping Co. Ltd., and
Assuranceforenigen Skuld (Gjensidig)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OS SHIPPING CO. LTD., and
ASSURANCEFORENIGEN SKULD
(GJENSIDIG), on its behalf and as subrogee of
OS SHIPPING CO. LTD.,

Plaintiffs,

v.

GLOBAL MARITIME TRUST(S) PRIVATE
LIMITED, JS LINE SA, and HONG JAE)
HYUNG a/k/a JAY H. HONG

Defendants.

Case No. Case No. 3:11-cv-377-BR

IN ADMIRALTY

PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION FOR
INTERLOCUTORY SALE OF
M/V GMT VENUS

INTRODUCTORY STATEMENT

On May 6, 2011, this Honorable Court issued its Opinion and Order denying Defendant JS LINE SA's ("JSL") Motion to Vacate the attachment of the M/V GMT VENUS. *See* Docket #75. In reviewing the applicable Ninth Circuit Court of Appeals standard and the facts before the Court on the record, Your Honor held:

In summary, the Court concludes Plaintiffs have met their probable-cause burden to show it is reasonably likely they will prevail on their alter-ego claim under either or both prongs of the federal common-law test for alter-ego liability . . . *Id.*, p. 30.

Counsel for Plaintiff ASSURANCEFORENIGEN SKULD (GJENSIDIG) (hereinafter "SKULD" or "Plaintiff") promptly sought to confer with counsel for JSL on Monday, May 9, 2011 in accordance with the directive of this Honorable Court. *Id.*, p.31. On the afternoon of Monday, May 9, 2011, JSL forwarded notice from the vessel's agent, Wilhelmsen Ship Service, that the vessel's costs and expenses have remained unpaid by JSL during its time in the port of Portland. Counsel for Plaintiff again requested prompt conferral with counsel for JSL in order to discuss the fees and the appropriate course of action for payment of same.

Specifically, the M/V GMT VENUS is required by a Captain of the Port Order issued by the United States Coast Guard to maintain armed security guards on board the vessel, due to the vessel's non-conformity with the International Ship and Port Security (ISPS) Code. *See* Declaration of George M. Chalos, Exhibit 2. As a result, the M/V GMT VENUS is accruing security guard costs at the rate of USD 3,840.00 per day, for a total of USD 176,640.00 since the time of attachment, some forty-six (46) days ago¹.

¹ Despite the clear obligation to pay for the required security guards, Owner JSL has failed and is otherwise refusing to remit payment for the outstanding balance.

1 The security guard amount does not include the *custodia legis* expenses which have been
 2 incurred to maintain and preserve the ship during its attachment, nor does it include the daily
 3 running costs of the vessel. Despite the repeated requests for a conference on urgent matters relating
 4 to the GMT VENUS, opposing counsel failed, neglected, and/or otherwise refused to meaningfully
 5 confer with Plaintiffs until late in the afternoon of Wednesday May 11, 2011 (*i.e.* 3:30 PM (PDT)).
 6 Prior to the conference, although the idea of substitute security was proposed, Defendant JSL failed
 7 to meaningfully provide any indicia of a *bona fide* willingness (or ability) to post substitute security.
 8

9 Moreover, the present market value of the vessel is only estimated to be in the range of USD
 10 4,900,000.00. *See* Declaration of George M. Chalos, Exhibit 3. Given the exorbitant costs and
 11 expenses accruing daily compared to the value of the ship, Plaintiff believes the Defendant's failure
 12 to provide security for the release of the GMT VENUS is deliberate and unreasonable. For the
 13 reasons more fully set forth herein, this Honorable Court should order an interlocutory sale of the
 14 vessel to preserve her value.
 15

16 POINT I

17 REQUEST TO SHORTEN TIME 18 PURSUANT TO FED. R. CIV. P. 6(c)(1)(C)

19 Plaintiff has promptly notified Defendant JSL of its intention to file the within motion and
 20 also its intention to request briefing on an expedited basis. Simultaneous with filing, Plaintiff has
 21 forwarded a copy of the motion and supporting documents to counsel for JSL. The Local Rules of
 22 the District of Oregon provide an opposing party fourteen (14) days to file a response to a motion
 23 pursuant to LR 7-1(e). Notwithstanding, LR7-1(g) permits the request for an expedited hearing.
 24

25 Moreover, the District Court may set a different time to respond for "good cause" under the
 26 Federal Rules of Civil Procedure, pursuant to FED. R. CIV. P. 6(c)(1)(C). Counsel for JSL is fully

1 familiar with the facts of this case and the applicable legal authority for a Motion for Interlocutory
 2 Sale, as provided for under the Supplemental Rules for Certain Admiralty and Maritime Claims. In
 3 the instant matter, the M/V GMT VENUS has been attached in the Port of Portland since March 28,
 4 2011.

5 Given the aggregating daily costs and expenses and the deteriorating value of the vessel as a
 6 result of the attachment, Plaintiff respectfully requests that the time for JSL to respond to the
 7 pending motion be shortened and that a prompt hearing be set forthwith by this Honorable Court.
 8 The district court “acting in its traditional role as an admiralty court of equity has always been
 9 available to all parties and interests to resolve on short notice by appropriate proceedings any and all
 10 issues which may arise as a consequence of a Rule B seizure.” *Parcel Tankers, Inc. v. Formosa*
 11 *Plastics Corp.*, 569 F. Supp. 1459, 1465 (S.D. Tex. 1983).

13 POINT II

14 THE FEDERAL RULES OF CIVIL PROCEDURE AUTHORIZE 15 THE SALE OF THE ATTACHED RES IN THESE CIRCUMSTANCES

16 Rule E (9)(a) of the Federal Rules of Civil Procedure, Supplemental Rules for Certain
 17 Admiralty and Maritime Claims (the “Supplemental Rules”), provides in relevant part regarding
 18 interlocutory vessel sales:

19 (a) *Interlocutory Sales; Delivery.*

- 20 (i) On application of a party, the marshal, or other person having custody of the property,
 21 the court may order all or part of the property sold—with the sales proceeds, or as
 22 much of them as will satisfy the judgment, paid into court to await further orders of
 the court—if:
 - 23 (A) the attached or arrested property is perishable, or liable to deterioration, decay,
 or injury by being detained in custody pending the action;
 - 24 (B) the expense of keeping the property is excessive or disproportionate; or
 - 25 (C) there is an unreasonable delay in securing release of the property.

26 Fed. Sup. R. E(9)(a).

Each of the three (3) enunciated reasons (deterioration, excessive costs and unreasonable delay) constitutes a separate and independent basis for interlocutory sale. *See Caterpillar Fin. Servs. Corp. v. Coleman*, 1999 U.S. Dist. LEXIS 22387, 2000 AMC 539, *1 (C.D. Cal. 1999); *see also Vineyard Bank v. M/Y Elizabeth I*, 2009 U.S. Dist. LEXIS 23844 (S.D. Cal. 2009); *Bank of Rio Vista v. Vessel Captain Pete*, 2004 U.S. Dist. LEXIS 21388, at * 2 (N.D. Cal. 2004). In order to prevail on a motion for interlocutory sale, the movant need only show that one of the above listed conditions is satisfied. *Caterpillar Fin. Servs. Corp.*, 1999 U.S. Dist. LEXIS 22387 at *1 (citing *Merchants National Bank of Mobile v. Dredge GENERAL G.L. GILLESPIE*, 663 F.2d 1338, 1341 (5th Cir. 1981)).

A. DISPROPORTIONATE COST OF KEEPING THE VESSEL UNDER ATTACHMENT.

There can be no doubt that the expense of keeping the vessel idle and under attachment at Portland is either excessive, disproportionate, or both. The daily costs and expenses incurred by the required services provided to maintain the vessel (from the time of its attachment through May 11, 2011) are USD 104,086.93². In addition, the value of the vessel (which is approximately USD 4,900,000.00) is steadily eroding by her daily running costs that include, *inter alia*, crew wages, insurances, victualing, lubricants, and bunkers. In total, it is likely that the value of the vessel has already eroded by costs and expenses approaching approximately USD 425,000 to USD 475,000 (*i.e.* nearly ten (10) percent of her real market value) – a state of affairs that benefits no one.

Under these circumstances, it would be appropriate for the Court to order the sale of the vessel as a conservatory measure to halt further economic deterioration of the *res*. *See Ferrous Financial Services Co. v. O/S ARCTIC PRODUCER*, 567 F. Supp. 400, 401 (W.D. Wash. 1983)

² This does not include the security guard fees that have also accrued at a rate of USD 3,840.00 per day.

1 (finding expense excessive and delay unreasonable where cost of maintaining the vessel was USD
 2 166,000 per year and defendant made no attempt to secure its release).

3 **B. UNREASONABLE FAILURE OF THE OWNERS TO PROVIDE SECURITY**

4 Supplemental Rule E(5)(a) provides for the release of an attached vessel against owner's
 5 adequate security. Since the time of the attachment, there has only been preliminary and non-
 6 substantial "without prejudice" indications from counsel for JSL that it might consider putting up
 7 alternate security. So far, these discussions have failed to bear any fruit. There has been no
 8 meaningful movement on the part of the Defendant JSL to release the ship against security.
 9

10 In these circumstances – *i.e.* the owner's unreasonable delay in providing security for the
 11 release of the ship, Supplemental Rule E(9)(a) authorizes the interlocutory sale of the attached
 12 vessel. *See, e.g., Ferris Financial Service Co. v., O.S. ARCTIC PRODUCER*, 567 F. Supp. 400
 13 (W.D. Wash. 1983); *Merchants National Bank of Mobile v. Dredge GENERAL G.I. GILLESPIE*,
 14 663 F.2d 1338, 1341-1342 (5th Cir. 1981); *Silver Star Enterprises, Inc. v. M/V SARAMACCA*, 19
 15 F.3d 1008, 1014 (5th Cir. 1994).
 16

17 In considering the reasonableness of Owner JSL's failure to provide security for the vessel's
 18 release, the Court should consider the extraordinary circumstances that have led to the attachment of
 19 the GMT VENUS, the refusal of JSL's alter-ego, Defendant Global Maritime Trust(s) Private Ltd.
 20 ("GMT"), to comply with the Declaratory Award issued by the London Maritime Arbitration
 21 Association Tribunal and failure to provide payment for amounts which are undisputedly due and
 22 owing under the award. Moreover, the lack of credibility of Defendant JSL in its pleadings to this
 23 Honorable Court and the efforts of GMT around the world to circumvent its obligations due and
 24 owing are substantial reasons to order the immediate sale of the vessel.
 25
 26

1 Plaintiffs recognize the “general rule” that a defendant is given enough time to secure the
 2 release of the vessel, typically understood to be four (4) months absent some other considerations,
 3 before the Court will order an interlocutory sale. *See United States v. F/V Fortune*, 1987 AMC
 4 2351, 2352 (D. Alaska 1987) (citing *Ferris Financial Service Co.*, 567 F. Supp. at 401). However,
 5 it is respectfully submitted that the expensive costs of keeping the vessel attached in the port of
 6 Portland, compared to the relative value of the vessel, warrants the immediate and prompt sale of the
 7 vessel prior to the completion of a generic, non-binding, four (4) month term.

9 Furthermore, in assessing the failure of the owner of the vessel to provide security for her
 10 release, the Court should take into account yet another factor. The GMT VENUS is a trading ship.
 11 Her very economic survival depends on her ability to be fixed into chartered employment, which is
 12 her very lifeblood that must flow uninterrupted. A gap of forty-six (46) days’ idleness in the life of a
 13 trading vessel represents a significant loss in her earnings for the year that cannot be made up³. It is
 14 by this measure that the reasonableness or not of the failure to provide security for the vessel’s
 15 release needs to be measured, not an arbitrary four (4) month period. Losing forty-six (46) days’
 16 worth of revenue is reason enough for the Owner of a vessel to provide security for her release from
 17 attachment or arrest. Nothing has been heard from the vessel’s owners regarding a substantive plan
 18 to provide security. The interlocutory sale of the vessel must inevitably follow.

20 CONCLUSION

21 For these reasons, an Order of this Honorable Court should be made directing the
 22 interlocutory sale of the M/V GMT VENUS under Supplemental Admiralty Rule E(9)(a), as the cost
 23

25 ³ As per the charter party agreement between GMT and Glovis Co., Ltd., Korea, the M/V GMT VENUS is to be paid at a
 26 hire rate of USD 8,500 per day pro rata. *See* Amended Verified Complaint, Doc. #57, ¶ 79. To date, the vessel has lost
 approximately USD 391,000.00 in hire payments.

1 and expense in maintaining custody of the property is disproportionate to both the value of the claim
2 and the value of the vessel, and her owner is unreasonably delaying the provision of security to
3 release the property.

4 DATED this 12th day of May, 2011.

5 WOOD TATUM

6 /s/ Robert I. Sanders

7 Robert I. Sanders OSB No. 70125

8 Email: ris@woodtatum.com

9 6915 SW Macadam Avenue, Suite 115

10 Portland, Oregon 97219

11 Tel: (503) 224-5430

12 Fax: (503) 241-7235

13 CHALOS & Co, P.C.

14 /s/ George M. Chalos

15 George M. Chalos (*admitted pro hac vice*)

16 123 South Street

17 Oyster Bay, New York 11771

18 Tel: (516) 714-4300

19 Fax: (516) 750-9051

20 E-mail: gmc@chaloslaw.com

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INTERLOCUTORY SALE OF THE M/V GMT VENUS** on the following parties:

C. Kent Roberts
Noah Jarrett
Catherine Brinkman
SCHWABE, WILLIAMSON & WYATT, PC
1211 Southwest Fifth Avenue
Suites 1600-1900
Portland, OR 97204
Email: njarrett@schwabe.com
cbrinkman@schwabe.com
ckroberts@schwabe.com

Owen F. Duffy
Email: ofduffy@gmail.com
Attorneys for Defendant JSL SA

Carl R. Neil
LINDSAY HART NEIL & WEIGLER
1300 SW Fifth Avenue, Suite 3400
Portland, OR 97201-5640
Email: cneil@lindsayhart.com
Attorneys for Cargo Owner Hyundai Motor America Corporation

by CM/ECF a true and correct copy hereof to said parties on the date below:

DATED this 12th day of May, 2011.

CHALOS & CO, P.C.

/s/ George M. Chalos
George M. Chalos (*admitted pro hac vice*)
123 South Street
Oyster Bay, New York 11771
Telephone: (516) 714-4300
Fax: (516) 750-9051
E-mail: gmc@chaloslaw.com
Attorneys for Plaintiff